Majlis Perbandaran Seberang Perai v Four Winds Freight Logistics Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22NCVC-127 OF 2011
VARGHESE GEORGE J
27 FEBRUARY 2012

Contract — Estoppel — Representation — Plaintiff published notice in government gazette to those having unclaimed deposits with it for more than 12 months to claim them within three months — Whether such notice only necessary if plaintiff had no further claims against depositors concerned — Defendant applied for refund of deposit paid under tenancy agreement with plaintiff — Whether plaintiff subsequent to gazette notice could claim from defendant monies due under tenancy agreement — Whether notice represented that plaintiff had waived all claims against defendant at date of notice

The plaintiff brought the instant action to recover arrears of rent and mesne profits from the defendant with which it had a tenancy agreement. The defendant had paid a refundable deposit ('the deposit') to the plaintiff under the agreement which sum the plaintiff was willing to offset against any award it obtained under the instant suit. Although the tenancy agreement had expired and vacant possession of the demised premises had been returned, for a period of more than a year after the latter event, neither the plaintiff nor the defendant made any claim against the other in connection with the tenancy. It was only when the defendant in response to a government *gazette* notice filed a claim for refund of the deposit, did the plaintiff respond by demanding for the arrears of rent and mesne profits. The *gazette* notice ('the notice') was taken out by the plaintiff pursuant to Treasury Instruction No 162 and required named persons (including the defendant) who had unclaimed deposits with the plaintiff for more than 12 months to claim them within three months failing which the deposits would be credited to state revenue. The defendant contended that the notice taken out by the plaintiff was a representation that it had no claims against the defendant as at the date of the notice and that the deposit would be refunded unconditionally without any deduction thereto. The notice, the defendant said, had extinguished the plaintiff's claim in the instant action. The plaintiff argued that the statements in the notice raised neither an estoppel nor a waiver such as to deny it of its claim against the defendant. The defendant had filed a counterclaim but abandoned it during the trial.

Held:

(1) By the publication of the notice, the plaintiff had waived whatever rental arrears and mesne profits were due from the defendant at the time of its publication (see para 38).

(2) Treasury Instruction No. 162 only required a *gazette* notice for refund of unclaimed deposits to be published if, and only if, there were no specific reasons to withhold such refund. If, and only if, the plaintiff did not have any other claims, or the deposit held was free from any deductible claims, was it necessary to publish the *gazette* notice. Where, as here, the plaintiff intended to pursue its claim and offset the deposit against that claim, it was not necessary to have published the notice (see para 19).

(3) Despite being fully aware the defendant owed rental arrears and mesne profits, the plaintiff went ahead to publish the notice. It was an affirmative act voluntarily and consciously taken. There was no other reason for the publication except that the plaintiff intended to abandon whatever remaining claims it had against the defendant. To do justice between the parties, the plaintiff had to be estopped from going back on its representation held out in the *gazette* notice (see paras 32(c), 33 & 34).

(4) For more than a year after the defendant returned vacant possession of the demised premises, the plaintiff had taken no active steps to assert its right to claim the rental arrears and mesne profits until the defendant applied for refund of the deposit pursuant to the *gazette* notice (see para 32(d)).

[Bahasa Malaysia summary

Plaintif membuat tuntutan ini bagi mendapatkan sewa tertunggak dan keuntungan mesne daripada defendan yang memeterai perjanjian sewa dengannya. Defendan telah membayar deposit bayaran balik ('deposit') kepada plaintif di bawah perjanjian bahawa plaintif sanggup menolak jumlah tersebut daripada mana-mana award yang diperolehinya di bawah guaman ini. Walaupun perjanjian sewa telah tamat tempoh dan milikan kosong premis pajakan ('demised') telah dipulangkan, bagi tempoh lebih daripada setahun selepas kejadian ini, plaintif mahupun defendan tidak membuat sebarang tuntutan terhadap satu sama lain berhubung dengan sewaan. Hanya apabila defendan memberikan maklum balas kepada notis *warta* kerajaan dengan memfailkan tuntutan untuk pemulangan semula deposit, barulah plaintif membuat maklum balas dengan menuntut sewa tertunggak dan keuntungan mesne. Notis *warta* ('notis') yang dilaksanakan oleh plaintif menurut Arahan Perbendaharaan No 162 dan memerlukan orang yang dinamakan (termasuk defendan) yang tidak mempunyai deposit tidak dituntut dengan plaintif bagi tempoh lebih daripada 12 bulan untuk menuntutnya dalam jangka masa tiga bulan, di mana kegagalan berbuat demikian mengakibatkan deposit-deposit tersebut akan dikreditkan kepada hasil negeri. Defendan menghujah bahawa notis yang dijalankan oleh plaintif merupakan satu representasi bahawa ia tidak mempunyai sebarang tuntutan terhadap defendan pada tarikh notis dan bahawa deposit seharusnya dipulangkan tanpa syarat dan tanpa sebarang penolakan ke atasnya. Defendan menyatakan bahawa notis tersebut, telah memadamkan tuntutan plaintif di dalam tindakan ini. Plaintif menghujah bahawa pernyataan-pernyataan di dalam notis tidak menimbulkan satu

estoppel atau satu pengecualian yang menafikan tuntutannya terhadap defendan. Defendan telah memfailkan satu tuntutan balas tetapi mengabaikannya semasa perbicaraan.

Diputuskan:

(1) Dengan penerbitan notis tersebut, plaintif telah mengetepikan mana-mana tunggakan sewa dan keuntungan mesne yang terhutang daripada defendan pada masa penerbitannya (lihat perenggan 38).

(2) Arahan Perbendaharaan No 162 hanya memerlukan satu notis *warta* bagi pemulangan deposit tidak dituntut untuk diterbitkan sekiranya, dan hanya sekiranya, tidak terdapat alasan khusus untuk menahan pemulangan semula tersebut. Sekiranya, dan hanya sekiranya, plaintif tidak mempunyai mana-mana tuntutan, atau deposit yang dipegang bebas daripada tuntutan boleh tolak, maka adalah perlu untuk menerbitkan notis *warta*. Di sini, plaintif bertujuan untuk meneruskan tuntutannya dan menolak deposit terhadap tuntutan tersebut, maka adalah tidak perlu untuk menerbitkan notis tersebut (lihat perenggan 19).

(3) Walaupun menyedari sepenuhnya defedan berhutang tunggakan sewa dan keuntungan mesne, plaintif meneruskan rancangan untuk menerbitkan notis. Ini merupakan satu tindakan pengesahan yang dilaksanakan secara sukarela dan waras. Tidak terdapat alasan lain untuk penerbitan melainkan plaintif bertujuan untuk mengabaikan tuntutan-tuntutan yang tertinggal yang ada terhadap defendan. Bagi menegakkan keadilan di antara pihak-pihak, plaintif perlu diestop daripada mungkir representasi yang dinyatakan dalam notis *warta* (lihat perenggan 32(c), 33 & 34).

(4) Bagi tempoh lebih daripada setahun defendan memulangkan milikan kosong premis pajakan, plaintif tidak mengambil sebarang langkah-langkah aktif untuk mendapatkan hak menuntut tunggakan sewa dan keuntungan mesne sehinggalah defendan memohon untuk pemulangan semula deposit menurut notis warta (lihat perenggan 32(d)).]

Notes

For cases on representation, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4255–4259.

Cases referred to

Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd [1990] 3 MLJ 287; [1990] 1 CLJ 15 (Rep), SC (refd)

Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)

Muniandy a/l Thamba Kaundan Anor v D&C Bank & Anor [1996] 1 MLJ 374, FC (refd)

Norsechem Resin Sdn Bhd v Seal Incorporated Bhd [1999] MLJU 390, HC (refd)

Pan Ah Ba & Anor v Nanyang Construction Sdn Bhd [1969] 2 MLJ 181, FC (refd)

Sarawak Electricity Supply Corp v Celcom (M) Sdn Bhd [2002] 5 MLJ 490, HC (refd)

Super Chem Products Ltd v American Life and General Insurance Co Ltd & Ors [2004] 2 All ER 358, PC (refd)

Legislation referred to

Local Government Act 1976

Kanesh Sundram (Kumitha Abdul Majid with him) (Kanesh Sundram & Company) for the plaintiff.

G Rethinasamy (Ayasamy with him) (Rethina & Co) for the defendant.

Varghese George J:

BACKGROUND

[1] The plaintiff in this action was the local authority established under the Local Government Act 1976 for the municipal area of Seberang Perai, Pulau Pinang.

The defendant was an incorporated company engaged in the business of warehousing and logistics.

[2] The plaintiff had by a tenancy agreement dated 10 May 2006, let out to the defendant certain land, namely the whole of PT 110 and PT 210 and parts of PT211 and PT 208, in Mukim 14, Daerah Seberang Perai Utara, together with a warehouse erected thereon for a period of three years, that is from 1 April 2006–31 March 2009. The monthly rental payable by the defendant was RM35,000.

The defendant had at the inception of the tenancy paid the plaintiff a sum of RM105,000 as refundable deposit pursuant to the terms of the tenancy agreement.

The defendant had vacated the land and redelivered vacant possession of the warehouse on 31 July 2009.

[3] The plaintiff, by this suit, sought to recover from the defendant:

(a) arrears or unpaid rental for the period November 2008–March 2009 amounting to RM172,500;

(b) mesne profits (at double rental rates) for the period of holding over by the defendant, that is from 14 April 2009–31 July 2009 in the sum of RM280,000;

(c) damages; and

(d) interest.

The plaintiff was agreeable to off-set the sum of RM105,000 (held as deposit to the credit of defendant) against such judgment sum to be ordered in favour of the plaintiff and only recover the difference from the defendant.

[4] The *defence* put forward by the defendant was essentially that:

(a) all of the plaintiff's claims for arrears of rental or mesne profits, if any at all, had in any event, been waived by the plaintiff with the publication/representation in *gazette* Notice No 580 in State of Penang *gazette* of 5 August 2010 *(GN/05.08.2010)*, as this GN/05.08.2010 had recognised the defendant's right, without any reservation or condition, to be refunded the deposit sum of RM105,000; and

(b) the defendant was entitled to recover the sum of RM105,000 from the plaintiff without any deduction as the defendant had application for the release of the same within the three months from date of publication of GN/05.08.2010, as stipulated therein.

[5] By way of a *counterclaim* the defendant went on also to:

(a) contend that the 'tenancy arrangement' (which the defendant maintained had been converted to a 'monthly' tenancy after November 2007) had been wrongfully 'terminated' by the plaintiff (in March 2009) without proper or sufficient notice;

(b) claim from the plaintiff, *damages* caused in the circumstances for:

(i) loss of investment costs incurred by the defendant of RM600,000;

(ii) reimbursement of damages 'paid' by the defendant to their customer (sugar owner) amounting to RM100,000;

(iii) for 'non-renewal of the tenancy' amounting to RM300,000;

(iv) as a result of the plaintiff encroaching upon and restraining the defendant from removing the defendant's goods and 'compound lighting' from the land in question, and;

(c) for a refund of 'overpayment of rentals' paid by the defendant in the sum of RM76,000 with interest on those sums.

INTERLOCUTARY PROCEEDINGS

[6] The defendant had by way of an interlocutory application, (before the matter was set down for trial) sought an order that in any event, the sum of RM105,000 be paid *forthwith* to the defendant (notwithstanding the plaintiff's claims). After considering submissions, I made an order in the following terms:

> It is hereby declared that the defendant is entitled to the sum of RM105,000 presently with the plaintiff but the defendant is restrained from seeking to recover the said sum of RM105,000 for the plaintiff until further order of this court.

The plaintiff had conceded that the sum of RM105,000 was repayable to the defendant or was held on account of the defendant and in any case, this amount would eventually be off-set against any judgment sum the plaintiff obtained against the defendant in this action.

[7] The plaintiff too, on the other hand, had applied for leave to enter final judgment against the defendant on their claim. After having given consideration to the arguments of the parties, I had disallowed the summary judgment applied for, as I found that there were 'triable' issues particularly in respect of the effect of the GN/05.08.2010 and the issue of 'waiver' raised specifically by the defendant in their defence.

[8] There was no appeal against those interlocutory orders.

TRIAL

[9] The plaintiff called three witnesses. They were:

(a) Ahmad Syahrir bin Jaafar ('PW1'). *Penolong pengarah kanan, penilaian dan pengurusan harta* of the plaintiff;

(b) Sharulnizad bin Abdul Razak ('PW2'), *timbalan pengarah perbendaharaan* of the plaintiff; and

(c) Osman bin Amir ('PW3'), *Ketua Jabatan Operasi dan Kejuruteraan*, Rapid Penang Sdn Bhd (the present tenant of the subject land).

The main witness for the defendant was Edgar Stephen Pereira ('DW1'), the managing director of the defendant. The other witness called for the defence was one Hamid a/l VAS Abdul Gaffoor who testified that he was a freelance property management consultant.

[10] The parties were directed at the close of trial to simultaneously file written submission and a date was set for any clarification (if required by the court) and for decision.

[11] *At the submissions stage*, the defendant however chose to *abandon* completely, the defendant's *counterclaim* against the plaintiff.

Further, the defendant *restricted their defence* to the plaintiff's claim to *just one ground only*, namely, that whatever claim the plaintiff had against the defendant for arrears of rental, and/or mesne profits had been waived by the plaintiff by virtue of the publication by the plaintiff of GN/05.08.2010 and/or had been estopped by representations made therein. It was contended for the defendant that accordingly it followed that there was no longer any obligation on the defendant to pay any of the amounts claimed by the plaintiff in this suit.

[12] Notwithstanding the position that all other defences raised by the defendant in the pleadings or suggested during the course of trial (in the examination or cross-examination of witnesses) had been abandoned by the defendant, I felt it still necessary, for completeness, to make the following finding of facts, after having evaluated all testimony and documents adduced in evidence by the respective parties:

(a) the tenancy agreement dated 10 May 2006 between plaintiff and defendant continued to have effect notwithstanding the plaintiff's 'Notis Menamatkan Sewaan' of 12 November 2007. The tenancy under that agreement did not cease as the defendant had rectified the default to some extent and had by themself appealed for the tenancy to continue. As such the defendant's contention that a monthly tenancy ensued after November 2007 — was without merits and was accordingly rejected;

(b) the tenancy between the plaintiff and the defendant continued to run its full course until it came to an end by effluxion of time on 31 March 2009 under the terms of the tenancy agreement.
The plaintiff's letter of 31 March 2009 was a notice to the defendant to vacate and deliver vacant possession issued after the expiry of the tenancy period as the defendant continued to hold-over the premises. The 14 day period given in the notice to quit and deliver vacant possession — was reasonable in such circumstances;

(c) during the course of the tenancy period, the defendant had on various occasions defaulted in the payment of the monthly rentals due. At the expiry of the tenancy period on 31 March 2009 — there was still arrears of rental to be paid by the defendant.
The plaintiff was not obliged in such circumstances to extend the tenancy;

(d) the defendant's complaints as to 'unsuitability' of the premises for reason

of 'flooding' etc were not supported by satisfactory evidence and therefore totally devoid of any merit; and

(e) the defendant finally delivered vacant possession of the premises to the plaintiff only on 31 July 2009.

[13] On the evidence before me, it had been established by the plaintiff, to my satisfaction, that there was:

(a) arrears of rental still due from defendant to the plaintiff for the period between November 2008 and March 2009 in the sum of *RM172,500*; and

(b) mesne profits (on double rental basis) was recoverable by the plaintiff from the defendant for the period 15 April 2009–31 July 2009 and this amounted to *RM280,000*.

As such the defendant owed the plaintiff at the time of the return of the premises (on 31 July 2009) the total sum of RM452,500.

ONLY ISSUE FOR DETERMINATION

[14] The sole issue that remained for determination therefore was, to put it in layman's language, whether by virtue of the GN/05.08.2010 the defendant had been absolved from any further liability to settle the arrears of rental and mesne profits due to the plaintiff. In other words, whether the debt of the defendant had been effectively wiped out.

In legal parlance, it was the defendant's argument that the plaintiff was estopped by express representation in GN/05.08.2010 from recovering any sum still owing to the plaintiff and that the defendant had, what is claimed to be, a 'legitimate expectation' to be paid the RM105,000 outright without any deduction by reason of that publication upon the defendant's demand for release made within time.

The plaintiff's position however was that in law no estoppel as alleged had arisen and on the issue of whether there was a 'waiver' of the plaintiff's entitlements by reason of the statements in GN/05.08.2010, it was submitted that the legally accepted criteria for an effective waiver to operate against the plaintiff had not been satisfied in this case.

[15] After the close of trial and submissions, it was my view, that the determination of this issue was best addressed from three perspectives. They were:

(a) the contents, albeit representation in GN/05.08.2010, particularly in the context of the requirement of the Treasury Instruction No 162, pursuant to which it was published;

(b) the testimony of relevant witnesses and the evidence generally before the court; and

(c) the testimony of relevant witnesses and the evidence generally before the court.

GN/05.08.2010 TREASURY INSTRUCTION NO 162

[16] I first examined the words employed in *GN/05.08.2010* and its implications in its ordinary and natural meaning. The English version in the body itself of the GN/05.08.2010 were in the terms as reproduced here:

> Pursuant to Instruction 162 of Treasury Instruction, it is notified that the persons named in column (3) of the Schedule are requested to claim their deposits which have remained unclaimed for more than twelve months from the Municipal Council of Province Wellesley for the amount specified in column (6) of the Schedule. If the deposits are not claimed within a period of three months from the date of publication of this notification, such deposits will be credited to the State Government Revenue.

This was a public notice being issued by a governmental authority to the world at large through the state *gazette*. It was a precursor to an intended forfeiture of unclaimed monies held in its coffers, that is, if no claims for refund were forthcoming within the stipulated period. It was a notice of great significance, both to the issuer (the plaintiff) and also to those identified in the Schedule attached to GN/05.08.2010, to be entitled to such a refund.

[17] What could not escape attention and particular note, to me, from this statement contained in the GN/05.08.2010 were the following:

(a) GN/05.08.2010 had two distinct parts to it. The *first* was an acknowledgement that the named parties in the Schedule were entitled to a refund of their identified deposits held by the plaintiff. The *second* was a commitment to effect a refund of the deposit sum, if any of the concerned parties made an application for the refund within three months of the publication of GN/05.08.2010; and

(b) it was an unqualified acknowledgment and commitment by the plaintiff that was set out in that notice in GN/05.08.2010. There was no condition imposed or any saving provision stated within it to reserve the right, if any, to the plaintiff to off-set that deposit sum against any other claim that the plaintiff had at that point of time in respect of the subject transaction (or even otherwise) against the party who was named as entitled to the refund.

The matters expressly conveyed by the contents of GN/05.08.2008 amounted

to an unequivocal acknowledgement of and an irrevocable commitment to pay by the plaintiff, if an application was made for the refund within three months of its publication.

This was also implicit from the further statement therein that if no application for refund was forthcoming as stipulated, the deposit would be credited to the State Government Revenue; in other words it would not be applied for any other cause or claim but absorbed as revenue of the government.

[18] I then examined *Treasury Instruction No 162*, pursuant to which the GN/05.08.2010 was stated to have been initiated and published. It read in Bahasa Malaysia as follows:

> *Arahan 162*:
>
> Deposit Yang Tidak Dituntut Hendaklah diwartakan,
>
> *Jika tiada sebab-sebab khas pada sebaliknya* deposit yang tidak dituntut selepas tempoh 12 bulan dan tarikh deposit *boleh dikembalikan* hendaklah diberitahu dalam Warta Kerajaan. Jika deposit itu masih tidak dituntut dalam masa tiga (3) bulan selepas pemberitahuan itu maka ia hendaklah dikredit kepada hasil. Adalah menjadi kewajipan pegawai penjaga akuan menentukan bahawa pemberitahuan itu diwartakan seperti di Lampiran W. (Emphasis added.)

The opening words of Arahan 162 were key words and had significant implication, especially in the factual context of this dispute/controversy here between the parties.

Rendered in English — those opening words used, would read:

> If there were no specific reasons otherwise …

[19] Treasury Instruction No 162, in my interpretation of the same, without any doubt only required that a *gazette* notification had to be published to effect refund of deposits (ie in respect of unclaimed deposits exceeding twelve months, prior to it being forfeited to national or state coffers, as the case may be) *if and only if*. there were no specific reasons to withhold such refund. Specific reasons to withhold such refund, obviously would include instances where there were monies owing to or to be settled with the relevant public authority by the person who was otherwise entitled to the refund.

In other words, with particular reference to the fact-scenario in this instant case, if and only if, the plaintiff here did not have any other claims or the deposit held was free from any deductable claims, was it only necessary in the first place, to publish such a *gazette* notification at all. It was not that in all cases where a deposit had not been claimed within twelve months that such a *gazette* notification had to issued and published as a must. Where, as in this case, the

plaintiff now claimed that the defendant had an undischarged debt owing to the plaintiff, it was not necessary to proceed with the issue and publication of GN/05.08.2010.

This was the plain and obvious meaning and intention behind the Treasury Instruction No 162 and in particularly the opening words/saving provisions there.

EVIDENCE

[20] Vacant possession of the land and warehouse had been returned by the defendant to the plaintiff on *30 July 2009*. It was also not in dispute that on 13 July 2009 the plaintiff had in writing given the defendant notice of their claim for arrears of rental and mesne profits. Similarly, the defendant had also written on *15 July 2009* through their solicitors raising various issues and dissatisfaction and intimating a possible claim for damages by the defendant against the plaintiff. This exchange of correspondence appeared to have crossed each other, as there was no reference in one to the other or vice-versa.

[21] It was also not in issue as a matter of fact that *between July 2009 and 5 August 2010* (when the GN/05.08.2010 was published) the plaintiff had not pursued with any correspondence to affirm and advance their claim for the arrears of rental and mesne profits or initiated any action to that end. Similarly, the defendant too had not made any claim for the refund of their deposit with the plaintiff during that period.

[22] There was a lapse of slightly more than a year, before the next set of events unfolded between the parties and it was triggered by the publication of GN/05.082010. The defendant by their solicitor's letter of 25 October 2010 to the plaintiff within the three months deadline stipulated in GN/05.08.2010, applied for the deposit sum of RM105,000 to be refunded to the defendant.

It was the defendant's said demand for refund that resurrected, as it would appear, the plaintiff's demand made now through their solicitor's letter of 9 November 2010 for the arrears of rental and mesne profits. A further notice of demand was issued by the plaintiff's solicitors on 1 February 2011 before this action was filed on 25 February 2011.

[23] It was against this backdrop of developments that one had to assess the relevant aspects of the evidence led through the witnesses before the court, as to what was the effect or understanding behind the publication of GN/05.08.2010.

[24] *As regards PW1*, I found the following testimony of this witness when cross-examined by defendant's counsel to be material in this respects to the issue at hand here.

Put: *Warta Kerajaan* — 05.10.2010 — Plaintif telah setuju membayar balik RM 105,000/- kerana (tidak) tuntutan terhadap Defendan — Setuju?

J: Saya setuju.

Put: When you decided — to return the RM105,000/- whatever claim Plaintiff had against Defendant has been *waived* or forgiven?

J: Saya setuju.

Put: Tindakan mewartakan, mengesahkan Plaintiff tidak boleh membangkitkan apa-apa tuntutan lagi?

J: Saya setuju.

S: Refer to Q/A 4(d)

Jadi *gazette* Notice adalah membuktikan bahawa Plaintiff setuju membayar balik RM105,000/-?

J: Saya ta'setuju

Put: Plaintiff claim for arrears of rental, mesne profits, etc in this action is an afterthought?

J: *Tak pernah* — tak setuju kerana pada 13.07.2009 Plaintif ada tuntut mesne *profits* — @p.77 CABD.

S: Jelaskan kenapa Warta Kerajaan sebegitu dikeluarkan?

J: MPSP tertakluk kepada Arahan Perbendaharaan. *gazette* Notice dibuat bagi memenuhi Arahan tersebut.

Counsel for the plaintiff did not choose to reexamine this witness to establish any clarification or correction in respect of this part of PW1's testimony.

[25] *As for PW2*, upon being further questioned by me before he was released, this witness for the plaintiff had the following to say:

Soalan dan Mahkamah:

S: *gazette* Notice sebelum dihantar — untuk penyiaraan — siapa yang akan menandatanganinya?

J: Pengarah Kewangan MPSP yang mengeluarkannya. Saya sediakan maklumat berkenaan dengan kandungan *gazette* Notice ini. Saya ada semak tiap-tiap fail berhubung dengan deposit-deposit yang disenaraikan dalam jadual.

Berhubung dengan fail ini, saya sendiri meneliti fail ini.

Pada masa itu saya tahu Defendan ada tunggakan.

Walaupun ada tunggakan oleh Defendan, saya telah terus menyenaraikan deposit, mereka untuk tuntutan balik.

Penjelasan — Ikut Arahan 162, kerani mesti mewartakan semua deposit yang dipegang yang melebihi 12 bulan

walaupun ada tuntutan MPSP atau tunggakan yang mesti dijelaskan kepada MPSP.

Setuju dalam warta ini tidak ada apa-apa perkataan yang mengatakan bahawa penwartaaan ini adalah tanpa 'prejudis/tanpa menjejaskan hak MPSP yang ada terhadap pihak-pihak yang disenaraikan.

pemwartaan ini adalah untuk umum.

[26] In my assessment, the material evidence of these two witnesses for the plaintiff taken as a whole betrayed an attempt to cover-up for or to deflect liability for the publication of GN/05.08.2010 to some other and to be shielded under the Treasury Instruction No 162 in any case. Be that as it may, the extracts of their testimonies reproduced above bore out the fact that there was among the plaintiff's officers an acceptance that the *gazette* notice had the effect of extinguishing the arrears of rentals and mesne profits then unpaid by the defendant or at least, there were serious doubts prevailing as to the effect of the publication of the *gazette* notice on those debts, at the plaintiff's end.

The *pengarah kewangan* of the plaintiff (the authority and the ultimate person responsible for the GN/05.082010) was not called to give evidence. PW2 was his deputy and most significantly he confirmed that he had vetted the relevant file of the defendant and was fully aware of the amounts still owed by the defendant at that time but despite that knowledge of the existence of the monies owed by the defendant to the plaintiff, still went ahead to clear the publication of the GN/05.08.2010. His only explanation was that he was obliged or under a duty to do so pursuant to Treasury Instruction No 162; that excuse was contentious in any case, as discussed above in any case.

LEGITIMATE EXPECTATION, ESTOPPEL, WAIVER

[27] It was counsel for the defendant's contention that once the plaintiff decided to publish GN/05.08.2010, the defendant had a 'legitimate expectation' to be paid the RM105,000 outright without any further claims by the plaintiff. Whilst it is true that the concept of 'legitimate expectation' (where it involves a decision by a administrative authority) has been accepted to have impact not only on 'procedure' but extended to create a 'substantive' right as well (see *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65 (FC) a case of imposition of a condition that was being challenged), it was my view however that this principle of law was more pertinent and relevant to situations where there was a quasi-judicial determination by the administrative body. That was not the case here.

[28] Counsel for the plaintiff cited various authorities to support his

submission that the criteria or elements to hold that there had been an effective and binding 'waiver' had not been met. They were most helpful in my evaluation of the law on 'waiver'.

In *Super Chem Products Ltd v American Life and General Insurance Co Ltd & Ors* [2004] 2 All ER 358, Lord Steyn in the Privy Council had occasion to observe as follows:

> … The concepts of waiver and estoppels have often been explained. Generally, *waiver is of a unilateral character:* it involves giving up something. Estoppel by representation is bilateral in character and focuses on the impact on the representee. This is, of course, an extremely general statement. But it is sufficient for present purposes since it is common ground that waiver and estoppels can only be established, in the circumstances of the present case, if the insurers made *a clear and unequivocal representation* to the insured that they would not rely on the time bar. (Emphasis added.)

Our Supreme Court in *Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287; [1990] 1 CLJ 15 (Rep), speaking through Gunn Chit Tuan SCJ, had this to say:

> … Our law on waiver in s 64 of the Contracts Act 1950, is similar to the Indian law on the general principles of waiver under which it is open to a promisee to dispense with or remit wholly or in part the performance of the promise made to him or he can accept any promise which he thinks fit …
>
> … it had not been shown to the trial judge or to us that *the respondent had intentionally foregone its claims.* On the other hand the learned judge who saw and heard Mr Ong in the witness box accepted his evidence that the respondent did not intend to abandon its claims under the various contracts. We therefore agreed with the learned judge that as a matter of fact waiver did not apply in this case …

In an earlier case, our then Federal Court in *Pan Ah Ba & Anor v Nanyang Construction Sdn Bhd* [1969] 2 MLJ 181 laid out the fundamental elements of that had to be met to constitute 'waiver', in the following dictum of Lord Azmi LP:

> … Section 64(1) of the Contracts (Malay States) Ordinance 1950 (corresponding to s 63 of the Indian Contract Act 1872) provided that every promisee may dispense with or remit wholly or in part the performance of the promise made to him … in order to constitute a dispensation of a promise under s 63 of the Indian Contract Act, neither consideration nor an agreement is necessary *provided of course that it is clear from the evidence that the promisee had so dispensed with the performance of the promise by a voluntary conscious act and it must be an affirmative act on his part* … (Emphasis added.)

Principally what could be gelled from the above illuminative judgments were that whether there was 'waiver' or not in a particular case, was *a matter to be deduced from the evidence before the court. It could be founded on a unilateral act.* The *intention to forgo* any known preexistent claim was to be drawn from the

material and testimony before the court. The act and intention sought to be relied upon *must be evidenced by a voluntary conscious and affirmative act.* In other words, the relinquishment of a known right could not arise where there was coercion or pressure brought to bear to secure that act.

[30] Similar sentiments were expressed by the courts in*Norsechem Resin Sdn Bhd v Seal Incorporated Bhd* [1999] MLJU 390, in *Muniandy a/l Thamba Kaundan Anor v D&C Bank & Anor* [1996] 1 MLJ 374 and in *Sarawak Electricity Supply Corp v Celcom (M) Sdn Bhd* [2002] 5 MLJ 490, all brought to my attention by counsel for the plaintiff. In Norsechem, Steve Shim J (as he then was) used the phraseology here must be evidence of a clear and unequivocal representation of abandonment of claims". To me that did not represent a further criteria but was an elaboration of the same element-evidence of 'intention' to waive, which must be led at the trial and for the court to determine in the context of the facts emergent in each case.

CONCLUSION

[31] It was therefore left for me to apply the above principles of law to the analysis and observations I had made above, namely that:

(a) the contents of GN/05.08.2010, amounted to an unequivocal representation that the defendant was entitled to a refund of the deposit sum with the plaintiff and a commitment that if an application was made within three months the refund of deposit would be mad to the defendant;

(b) the Treasury Instruction 162, by its opening words, did not require the publication of such *gazette* notification in the first place, if there was cause to the contrary, that is if the plaintiff's intention was to pursue the arrears of rental or mesne profit claim and off-set the deposit against that due sum, and

(c) the testimony of PW2 in particular, that the plaintiff was fully aware of the outstanding arrears of rental and mesne profits due from the defendant but despite that still went ahead to publish GN/05.08.2010; and

(d) the plaintiff had not taken any active steps between 31 July 2009 and 9 November 2010 to assert their right to such owed sum at all, that is, until the defendant's application was made pursuant to the notice in GN/05.08.2010 for the refund.

[32] It was my judgment that, based on the above factors in particular and on the overall evidence before me, there was manifest a definite and discernable intention on the part of the plaintiff to waive whatever arrears of rental or

mesne profits that was still outstanding and due from the defendant. The publication of the GN/05.08.2010 was an affirmative act voluntarily and consciously done by the plaintiff when fully aware that there were those sums (now pursued in this action), still outstanding and due from the defendant at the time of the publication (see evidence of PW2 in particular, quoted above).

[33] Where the question was whether there was 'intention' behind a particular act (especially if the act led on to a unanticipated but serious consequence), it was only natural that persons involved would not come forward and readily make an 'admission' of such intent. It was for the court to deduce this state of affair from all relevant facts and circumstances surrounding the matter, notwithstanding and despite, as in this case, the strong protestations of PW1 and PW2.

[34] To do essential justice between the litigating parties here, the plaintiff had to be estopped from going back on their representation held out in GN/05.08.2010. The doctrine of estoppel was a flexible principle by which justice was done according to the circumstances of each case and was open to be applied to even bind parties to the meaning or legal effect of a document or clauses in a contract (see per Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331).

[35] There was no basis whatsoever in the plaintiff's counsel rather dismissive contention that GN/05.08.2010 was merely an invitation to the defendant 'to come and discuss'. It was far from that. Going by the plain terms, as discussed earlier above, it was my holding that there was no other reason for the publication except that the plaintiff intended to abandon whatever remaining claims it had against the defendant.

[36] I had adverted to earlier also as to the 'official' nature and the serious implications surrounding the publication of a notice through the respective state or the national *gazette*s. It amounted to a notice to the world at large and of which the courts were bound to give due regard and accept as conclusive of the matters stated in its content.

Public officers, like in this case, had to discharge their duties responsibly and with a proper understanding of the Treasury Instructions No 162. By the saving provision at the head of the instructions itself, there was no necessity for such a *gazette* notice to be published at all if the plaintiff still had monies to be recovered from persons like the defendant. Both the officers of the plaintiff (PW1, PW2) did not have an appreciation of this aspect of the said Treasury Instruction when they repeatedly insisted that they were bound to publish the *gazette* in respect of unclaimed deposits held by plaintiff in excess of twelve months, in any event. Such an excuse was not one that was sustainable.

[37] Accordingly it was my conclusion that by the publication of GN/05.08.2010 the plaintiff had waived whatever arrears of rental or mesne profits that was due and owing to the plaintiff by the defendant at the time of its publication.

I therefore proceeded and:

(a) dismissed the plaintiff's claim against the defendant;

(b) struck out the defendant's counterclaim against the plaintiff;

(c) ordered that the defendant could proceed to enforce the order that I had made on 26 July 2011 and the payment of the sum of RM105,000 was to made by the plaintiff through the defendant's solicitors with interest thereon at the rate of 4%pa from the date of the judgment until full settlement; and

(d) ordered that each party bear their own costs in the circumstances, since the plaintiff on the one part had failed in their claim and the defendant on the other part had abandoned their counterclaim late in the trial.

Order accordingly.

Reported by Ashok Kumar